No. 85-753

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In The

Supreme Court of the United States

October Term, 1985

STEPHEN S. PENNINGTON, ADMINISTRATOR FOR THE ESTATE OF CESAR HUGO CALLE TORRES, DECEASED,

Petitioner,

vs.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

and

GRANCOLOMBIANA (NEW YORK), INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal district court may enter final judgment for defendants on a motion to dismiss or for summary judgment for lack of subject matter jurisdiction in a suit under the Jones Act by the estate of a foreign seaman, where it finds subject matter jurisdiction, and the evidence shows substantial contacts by the foreign shipowner with the United States.

2. Where the final judgment is based, *sub silentio,* on forum non conveniens and the district court fails to weigh the factors mandated by *Gulf Oil Co. v. Gilbert,* 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), should the judgment have been vacated and the case remanded to the district court to make such findings including the availability of a foreign forum.

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OPINIONS BELOW

The Opinion of Judge Clifford Scott Green of the United States District Court for the Eastern District of Pennsylvania is set forth in Appendix A. The final judgment for respondents, dated February 4, 1985, is set forth in Appendix B. The Judgment

Order of the Court of Appeals for the Third Circuit entered on July 1, 1985 is set forth in Appendix C. The Order denying Petition for Rehearing filed July 23, 1985 is set forth in Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on July 1, 1985. The Order denying Petition for Rehearing was filed July 23, 1985 which affirmed the district court's judgment in its entirety.

This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. § 688, provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . .

STATEMENT OF THE CASE

Respondent shipowner has previously been a respondent here in connection with a foreign seaman's claim under the Jones Act, and certiorari was denied.[1]

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1. *Rodriguez v. Flota Mercante Grancolombiana, S.A.*, 703 F. 2d 1069 (9th Cir. 1983), *cert. den.* No. 82-1936, ___ U.S. ___, 104 S. Ct. 84 (1983). While that record contains some facts bearing on the instant petition, it should be noted the record there is lacking in facts developed in this case—a situation substantially caused by misrepresentation that "Granco (NY) is not a subsidiary of defendant Flota", *Flota's Brief in the Ninth Circuit* (No. 81-4455), p. 6. (Cont'd)

Because it is impossible to determine from the district court's opinion (App. p. 1a) whether it decided the case on the ground of the foreign shipowner's lack of substantial, ongoing contacts with the United States or, *sub silentio*, on the basis of forum non conveniens, petitioner is compelled to a more extensive discussion.

The Court found that the contacts of the parties with the United States are insufficient "because Ecuador has a substantial interest in the resolution of [the] dispute . . . ." (App. p. 2a).

Petitioner brought suit under the Jones Act and the general maritime law of the United States for damages arising out of a fatality which occurred aboard the Ecuadorian flag vessel REPUBLICA DEL ECUADOR on February 17, 1978, while the vessel was in the channel of the Delaware River having just left the Port of Philadelphia.

Petitioner's decedent, a citizen of Ecuador, was boatswain of the M/V REPUBLICA DEL ECUADOR ("the vessel"). He was a member of the Ecuadorian seaman's union; his widow and child are citizens of Ecuador. He was killed when two empty unsecured containers in the No. 3 Upper 'tween deck of the vessel shifted crushing him to death.

An immediate investigation of the fatality was begun by the United States Coast Guard. The Coast Guard also determined

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(Cont'd)

Flota also misrepresented the number of its representatives in the United States and their function. The Court concluded it lacked subject matter jurisdiction under the Jones Act, 703 F. 2d at 1075, a conclusion criticized by Judge Kennedy in his concurring opinion, 703 F. 2d at 1075. In the instant case, the court below concluded it had subject matter jurisdiction.

that the operator of the vessel was the shipping company's wholly owned American subsidiary, (Doc. 004548).[2]

The Philadelphia Medical Examiner also began an extensive forensic investigation into the death (Doc. 004567).

Upon the vessel's return to Philadelphia pursuant to Order of the Coast Guard and the Port Captain, the American Bureau of Shipping conducted a survey of the vessel and found the vessel had a pronounced list to the port side which contributed to the shifting of the unsecured containers.

At the time, the vessel was bound for the ports of New York, Baltimore and Charleston, and was en route to New York on its regularly scheduled run.

The respondent, Flota Mercante Grancolombiana, S.A., ("Flota") was established on June 6, 1946 by a decree signed in Bogota, Colombia by representatives of Ecuador and Venezuela, and Colombia. It was formed principally by the Federation of Coffee Growers of Colombia, and its stock is owned by the Federation (80%) and by the Banco Nacional de Fomento of Ecuador (20%). Flota's directors are Colombian and Ecuadorian, and they meet in Bogota.[3] No American citizen is on the Board.

Three years after it was formed, Flota made its appearance in the competitive United States market. Using a wholly owned

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2. Extensive discovery, over several years, was conducted. The numbering system of documents used here is that used below. The Appeal was allowed on the original record. Reference to the Clerk's docket will be "C" and docket number. All italics are added unless otherwise stated.

3. The vessels with which Flota commenced business in 1946 were purchased from the United States Government. Flota is a common carrier in American trade. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966).

subsidiary, Transportadora Grancolombiana, Ltd., ("Transportadora"), Flota began operations in New York, and established offices in Detroit, Chicago, New Orleans, and San Francisco. From that time to the present, Flota has been a significant factor in United States shipping on the Gulf, East and West coasts. Transportadora was the predecessor of Grancolombiana (New York), Inc. ("Granco").

In 1958, Flota formed Granco under the laws of New York. Granco's first office was in the same suite as Transportadora. The word "Grancolombiana" is frequently used interchangeably to identify Flota and Granco (C-108), and both companies use the identical logo extensively in their daily American advertising in such newspapers as *The Journal of Commerce*, and in magazines like *The Pacific Shipper*.

From its inception, Granco has been a wholly owned subsidiary of Flota and the base by which Flota has captured a significant share of the American shipping market. The Court below totally disregarded the extensive use made of Granco by Flota in running its shipping operations in the United States and elsewhere, and ignored the extensive findings submitted by the petitioner, each of which was documented in the record of Flota's base of operations in the United States. In fact, the district court made no specific findings on Flota's contacts, though requested by petitioner to do so (C-207).

From its inception, Granco has "served" one company and one company only - Flota.[4] As Flota's wholly owned American

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4. The district court found Flota and Granco were "separate corporate entities" (App. p. 8a) as indeed they are. However, under New York law, where Granco is incorporated, when a subsidiary is created to carry on the particular business of the parent, ". . . there is no basis for distinguishing between the business of the parent and the business of the subsidiaries." *Bellomo v. Penna. Life Co.*, 488 F. Supp. 744, 746 (S.D. N.Y. 1980).

subsidiary, Granco has received "loans" totalling several million dollars from Flota, and has provided services extending beyond the services of a General Agent such as carrying on its books as *both* an asset and a liability, an entry: "Loan payable—vessels under construction" in an amount in excess of 27 million dollars representing payments for the construction of Flota vessels in Poland. The so-called General Agency Agreement between Flota and Granco is the instrument for the actual business operation of Flota in the United States under the deceptive title of a "general agency" agreement.

Granco has the *exclusive* function of making payments on Flota's behalf *everywhere in the world where Flota's vessels trade,* and Flota's *entire* financial operation is centralized in New York City in the office of Granco. Captain Ramirez, who testified by deposition, is the Manager of Flota's Shipping Division and reports directly to the General Manager. He was asked:

> Q. Now, is there a computer in the offices of Grancolombiana (New York) that centralizes all of this money that is handled by flota—all of this money that relates to Flota? Is that a computerized operation in New York?
>
> A. Yes, it is. (C-108).

Earlier in the deposition, he was asked about the relation between Flota and Granco and Granco's functions, and he answered, ". . . and we have given to Grancolombiana (New York), Inc. the function under our previous and precise instructions to make payments *all over the world on our behalf.*" (C-108). The purse of Flota is in New York, not Bogota.

Flota's significant U.S. Dollar currencies are kept in the Bank of America, and in J. Henry Schroeder Bank and Trust Co., both

in New York City, and the latter bank has Flota's authority to invest excess funds on deposit with them.

Overdrafts between four million and eighty-two million dollars appear in these accounts. Average daily balances are frequently in excess of two to three million dollars. Bank of America also hold mortgages on certain of Flota's vessels.

Flota also maintains bank accounts in Miami, Houston, New Orleans and San Francisco, where its representatives are located.

Of ever greater significance to this case, but ignored by the lower court, is Granco's responsibility for coordinating cargo stowage and voyage accounts on Flota vessels bound for New York (which includes the vessel on which petitioner's decedent met his death). The stowage plan for the "outbound cargo" of the vessel for the voyage on which petitioner's decedent was killed was prepared in New York by employees of Granco.

Captain Ramirez, an official of Flotá, conceded Flota has no other general agent "anywhere in the world" which is its "wholly owned subsidiary", nor does it have any "general agent" anywhere in the world with whom it interchanges employees as it does with Granco (C-108). Flota's largest operational office is in New York City in the offices of Granco.

In addition to Granco, Flota has two other wholly owned American subsidiaries. Sucre Banana Import Corp. (a Texas corporation), and New World Ship Brokers (a New York corporation) and both operate out of the offices of Granco in New York City. When Sucre was formed in 1965 (and again in 1966, 1967 and 1968), Flota received substantial management fees and commissions.

The sole shareholder of these companies is Flota, and the officers and directors are the officers of Granco.

To begin an analysis of Flota's extraordinary growth in United States shipping, the starting point is Dr. Alvaro Diaz S., ("Diaz"), the peripatetic General Manager of Flota. Diaz appears in the United States with such regularity and frequency that in 1972 the Secretary of State of the United States described his *principal office* as being in New York City.[5]

Flota has six corporate agents permanently based in the United States, four of whom are known as "delegados". "Delegados" have authority to bind Flota, and are the company's direct representatives in the United States.

In addition to the four "delegados", Flota's Technical Director, Manual Mazas, is permanently based in New York at the pier leased on a long term basis by Flota in Brooklyn. He is responsible for coordinating maintenance and repair activities of Flota's vessels when repaired or maintained *in any facility in the United States, Canada and Central America.* As for major items of vessel repair anywhere in the world, he has full operational responsibility. He had responsibility for the broken cofferdam aboard the vessel which caused the list and which substantially caused the accident resulting in the death of petitioner's decedent.

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5. The State Department note (Doc. 004725-27) states in pertinent part:

> 3. We recognize that it is largely Flota Mercante Grancolombiana rather than Government Agencies that has called shots on Colombian shipping policy and practices and *that key Flota official, Alvaro Diaz, has main offices in New York.* Repeated efforts by U.S. shipping lines and Government Agencies to work out equitable compromise with Diaz have failed, although latter regularly promises to cooperate.

There is a sixth direct employee. Victor Manso is a port engineer in New York City. While paid by Granco, Flota reimburses its subsidiary for his salary (C-108).

Flota's vessels, with the familiar ship's wheel logo on their smokestacks are seen daily in American ports from Longview, Washington to New York City. (Doc. 00191-001248).

Of the approximately thirty-one vessels owned by Flota in 1979, one half are engaged *exclusively* in trade with the United States, a fact completely ignored by the lower court.

At least once and sometimes two, three or four times a week, at least one of Flota's vessels arrives or departs from ports on the United States East Coast and its vessels in the United States North Atlantic Service have been present in the Port of Philadelphia at least two or three times a month over the past ten years (with the possible exception of the S.S. HEKTOR and S.S. SAAR) (C-49).[6]

Flota, for several years, maintained a bi-weekly service known as LINEA NEW YORK/CARIBE between New York and the East Coast of Central America, so that its vessels stopped in Philadelphia approximately every two weeks. The service was

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6. At least 26 of *its wholly owned vessels* are engaged in regular scheduled runs between various U.S. ports and foreign countries. *Six of these vessels make scheduled stops in the Port of Philadelphia as part of a regular line service known as the New York/Colombia/Ecuador Line.* At least once during these months preceding the accident, the S.S. REPUBLICA DEL ECUADOR was in the Port of Philadelphia: January and March, 1973; March, April, May, July and September, 1974; June, July, August, September, October and December of 1975. With the exception of April, October and December of 1976, every other month in 1976; January, February, March, May, July, August and December of 1977, February, 1978. This vessel also makes additional stops in New York, Galveston, and Miami (Docs. 003843-3856).

started in January, 1966 and operated for about five years. For many years, Flota has maintained, and still maintains, a regular service to South America with up to two sailings *weekly* from Pier 3, its Brooklyn, New York Terminal. This is widely advertised.

Flota also ran a NEW YORK/TUMACO liner service which operated about five years. Philadelphia was an "inducement" stop on that service which meant its vessels would stop in Philadelphia if cargo was available — probably not more than once per year when that specific service was operating. *It has been supplanted by a regular Philadelphia run.* It was on this run that petitioner's decedent was killed.

These liner services were in addition to Flota's regular line service to ports on the Gulf and West Coasts of the United States. In 1973, Flota initiated vessel service for the transport of liquid chemical cargo in bulk between Colombian and U.S. ports in the Gulf of Mexico.

In 1974-1975, and prior, Flota operated three vessels in trade between ports on the West Coast of the United States and ports in South America. Flota did not at that time operate a service from the U.S. West Coast to the North Coast of Columbia, although it does now.

Flota, in 1976, commenced transport of vegetable oil *from* the U.S. Pacific Coast to Buenaventura, and expanded its transport of this cargo between Gulf ports of the United States, Buenaventura, and Ecuador by a one-third participation with other companies.

So extensive are Flota's operations in the United States that its *Annual Shareholder's Report* for 1977, stated:

> "We *linked* our Colombian, Venezuelan and Ecuadorian ports with the great ports of the three coasts of the United States and Canada"
>
> ". . . *in order to attend to the demands of U.S. exporters,* it was necessary, at times, to lease ships in order to replace the ones that were tied up at port. This costs more than US $2,000,000.00" (Docs. 002824-2947).

Flota's involvement in United States shipping trade is also documented in the records of the Federal Maritime Commission. On December 22, 1976, Flota entered into two agreements, one with Andino Chemical Shipping Company and the other with Maritime Transligra, S.A., covering United States ports, and both Agreements were filed for approval with the Federal Maritime Commissions. (Doc. 004614).

When certain objections were raised before the Federal Maritime Commission regarding those Agreements, Flota requested a hearing. Flota clearly stated in its *Request* that substantial testimony would be presented, and made the following explicit representations regarding witnesses *it* intended to call in support of Agreements Nos. 10293 and 10295; (Docs. 004632-4643). It would call —

A. H. Remson Whitehouse, Executive Vice President of Grancolombiana (New York), Inc. to testify with regard to the type of service which will be offered by Flota.

B. Mr. Carlos Abandano of the Houston Office of Flota to testify with references to shippers in the United States and importers in Colombia who require this service.

In the United States, Flota utilizes the "delegados" and officers of its subsidiary to make binding representations on its behalf before official agencies of the United States. The Ninth Circuit in *Rodriguez v. Flota, supra,* had none of this information, nor did this Court when it denied certiorari in *Rodriguez.*

This volume of maritime activity in the United States has generated significant litigation involving Flota.[7]

The revenues from its United States trade constitute a significant percentage of gross revenues. In 1975, nearly 83% of total revenues from lines *which it exclusively operated* came from United States Trade.[8]

Between 1973 and 1978, in excess of 353 million dollars was earned from Flota's three lines trading with the United States exclusively.[9] The Port of Philadelphia alone accounted for a sum

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7. A full list of these cases, occupying 31 lines of footnote is set forth on page 4, footnote 2 of the *Petition for Writ of Certiorari in Rodriguez v. Flota Mercante Grancolombiana, supra.* To this list should be added the recent cases of *French American Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 609 F. Supp. 1352 (S.D. N.Y. 1985) and *Flota Mercante Grancolombiana, S.A. v. Fla. Const. Equip. Co.*, 608 F. Supp. 1515 (E.D. La. 1985).

8. For the year 1975, earnings totaled $71,267,000 in freight charges from lines *which it exclusively operated.* That figure included:

$34,029,000 from New York/Pacific Line;
$14,427,000 from the Gulf & Pacific Line;
$10,844,000 from the West Coast U.S.A.

TOTAL $59,300,000 (83% of revenues). (Doc. 002961).

9. The three lines are the New York/Pacific, Gulf/Pacific, and U.S. West Coast. Of the 16 lines of regular service of Flota listed in the 1975 Shareholder's Report, at least seven are to and from American ports:

(Cont'd)

in excess of 22 million dollars of that amount. (Docs. 002888, 002928, 003315 and C-30).

On this record, the Court below found insufficient contacts to warrant either the retention of the case or the application of American law.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals for the Third Circuit has:

1. So far sanctioned a departure from accepted procedure in federal forum non conveniens doctrine as applied to "blue water" foreign seamen as to call for an exercise of this Court's power of supervision to assure the uniformity of federal maritime law.

2. Affirmed without opinion a decision in conflict with decisions on the same subject matter of other Courts of Appeals including the Second, Fifth, Tenth and Eleventh Circuits on the important and frequently occurring question of when to apply

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(Cont'd)

New York/Pacific Line
New York/Carribean Line
Gulf-Pacific Line
USA-Canada-Pacific, etc.
Special New York-Tumaco Line
Special New Orleans-Tumaco Line
Miami-Colombia Atlantic Line

The American ports include New York, Charleston, S.C., Wilmington, Del., Miami, Fla., Jacksonville, Fla., Baltimore, Md., Philadelphia, Pa., New Orleans, La., Galveston, Tx., Houston, Tx., San Francisco, Ca., Los Angeles, Ca., Oakland, Ca., Portland, Oregon, Savannah, Ga., Tampa, Fla., Long Beach, Ca. (Docs. 002948-2970).

Forum non conveniens in a Jones Act suit by a foreign seaman, and what the proper remedy should be if the doctrine is applicable.

3. By affirming a judgment, rather than a conditional dismissal, left petitioner without any remedy against the shipowner in any other court or tribunal elsewhere in the world.

BACKGROUND

Having concluded that *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953) *forecloses a dismissal* for failure to state a claim upon which relief could be granted or for lack of subject matter jurisdiction (App. 2a) the district court went on to find that "the contacts of the parties with the United States are insufficient to subject defendants to claims based on the Jones Act or general maritime jurisdiction *because* Ecuador has a substantial interest in the resolution of this dispute while any interest of the United States is insubstantial." (App. 2a).

Since the Court acted solely on the Motion for Summary Judgment, it was incumbent on the Court to resolve all factual disputes in this situation in favor of petitioner. *Chirino de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240, 1242, 1244 (3rd Cir. 1980).

There is substantial lack of uniformity in the various circuits on dealing with the foreign "blue water" seaman and the foreign shipowner. The Second Circuit in *Cruz v. Maritime Co. of the Phillipines*, 702 F.2d 47, 48 (1983) held that maritime choice of law principles are not relevant in a forum non conveniens analysis and went on to affirmatively hold

> . . . when the Jones Act is applicable federal law is involved and the district court must exercise

> its power to adjudicate, absent some exceptional circumstances such as the application of the abstention doctrine or, as here, the equitable principle of forum non conveniens.

But *Cruz* was a dismissal based *entirely* on forum non conveniens grounds and not on want of subject matter jurisdiction.

In *Volyrakis v. M/V Isabelle,* 668 F.2d 863, 866 (1982) the Fifth Circuit held that whether the Jones Act applies is a question of choice of law citing *Lauritzen v. Larsen,* 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953) and *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970).

Thus, in this vital area of federal maritime law where uniformity is the goal, substantial confusion exists, and the decision below was the product of this confusion between jurisdiction and forum non conveniens.

In a suit under the Jones Act, the Eleventh Circuit held that substantial business operations and revenues in this country justified the choice of the Jones Act and application of American law, notwithstanding that all seven *Lauritzen* criteria were foreign. *Szumlicz v. Norweigian American Line, Inc.,* 698 F. 2d 1192, 1195 (11th Cir. 1983):

> "Whether the Jones Act applies in this case involves a question of choice of law, the determination of which requires a *two-pronged inquiry*. First, the court must decide, under choice of law principles, whether the law of the United States should be applied. *If United States law applies, the case should not be dismissed for forum non conveniens.* If the court determines that United States law does not apply, it then examines the

> traditional considerations of forum non conveniens to determine whether the court should exercise its discretion and decline to assert jurisdiction over the case. *Volyrakis v. M/V Isabelle*, 688 F.2d 863 (5th Cir. 1982); *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5th Cir. 1981)."

Nothing of the sort was done here. In fact, it is exceedingly difficult to understand on what theory the court based its final judgment. In finding that "contacts" with the United States were insufficient "because" Ecuador had a superior interest, the court confused forum non conveniens with jurisdiction. The shipowner's contacts in this case were infinitely more extensive than in *Needham v. Phillips Petroleum Co. of Norway*, 719 F. 2d 1481 (10th Cir. 1983), *Cruz v. Maritime Co. of Phillipines, supra, Volyrakis v. M/V Isabelle*, 668 F. 2d 863 (5th Cir. 1982) or any other reported decision where a forum non conveniens dismissal was entered.

Petitioner has not discovered a single case in this Byzantine field[10] where, *in the absence of a forum non conveniens analysis*, a federal court disposed of a "blue water" foreign seaman's claim as the Court did here by judgment. See, *Vas Borralko v. Keydrill Co.*, 696 F. 2d 379 (5th Cir. 1983) (extensive discussion of differences between "blue water" and oil rig cases). Uniformity has been substantially impaired by this decision in admiralty.

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10. Petitioner uses this term advisedly. *Compare* the decision in the case *sub judice* with that of Judge Broderick in *Papaionniu v. Hellenic Lines, Ltd.*, 569 F. Supp. 724 (E.D. Pa. 1983) - same bench, same time period, substantially different result. *Compare* the Ninth Circuit's decision in *Gulf Trading and Transportation Co. v. M/V Tento*, 694 F. 2d 1191, 1193 (9th Cir. 1982) (a maritime lien case) with its decision in *Rodriguez v. Flota Mercante Grancolombiana, S.A., supra*. In *Gulf Trading*, it found the Fifth Circuit's decision in *Fisher v. Agios Nicolaos V.*, 628 F. 2d 308 (1980) (the "one stop" case) compelling precedent, in *Rodriguez*, it didn't.

Whether or not Ecuador has a "substantial interest" is something only determined in the context of a forum non conveniens analysis. *It has absolutely no bearing on the issue of contacts.*[11] There is no logical or conceptual linkage between criteria for determining contacts *and* another country's interest *outside* of a forum non conveniens analysis, where it would form only one consideration under *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09, 67 S. Ct. 839, 843, 91 L. Ed. 1055 (1947) and *Piper Aircraft v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

Not a single *Gilbert* or *Piper Aircraft* factor is mentioned in the district court's opinion, and certainly not a single factor was ever proved by respondents. In *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F. 2d 1015 (5th Cir. 1981), the principle was stated, and Fifth Circuit held that in Jones Act cases the Court must begin with the assumption that it will exercise jurisdiction and that plaintiff's choice of forum should rarely be disturbed. *Chiazor, supra*, 648 F. 2d at 1019.

After making a detailed analysis of the historical development of *forum non conveniens* in admiralty and non-admiralty cases, the Fifth Circuit in *Perusahaan Umum Listrik Negara v. M/V Tel Aviv*, 711 F. 2d 1231 (5th Cir. 1983) concluded "A forum

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11. One of the strongest factors militating against any law other than American were the cross-claims between shipowner, stevedore and carpentry company and petitioner's allegations that the death may have been caused in part by the local stevedore's negligence. In this situation, Gilmore and Black conclude "[I]t would be a wise exercise of judicial discretion to retain jurisdiction and adjudicate the liability of the foreign defendant as well. Romero certainly cannot be taken as foreclosing that possibility." Gilmore & Black, *The Law of Admiralty*, § 6-64, p. 480 (2d Ed. 1975). This is precisely what the court did in *Kearney v. Savannah Foods & Industries*, 350 F. Supp. 85, 1972 A.M.C. 2629 (S.D. Ga. 1972) and what the stevedore defendant in this case asked the court to do.

non conveniens dismissal should never be granted, irrespective of *Gilbert* factors, *unless* the defendant can satisfy the Court that an adequate and available alternative forum exists". 711 F. 2d at 1238. This was never done here and had it been done, it would have only been proper to enter a conditional dismissal, conditioned upon the foreign shipowner's agreeing to accept the foreign jurisdiction. *Diaz v. Humboldt*, 722 F. 2d 1216 (5th Cir. 1984) (district court decision vacated and remanded where dismissal of foreign seaman's claim not made conditional).

As it now stands, petitioner has been completely deprived of any remedy anywhere by this judgment.

CONFLICTS

The Third Circuit's affirmance without opinion of the district court decision is in conflict with *Nicol v. Gulf Fleet Supply Vessels*, 743 F. 2d 289 (5th Cir. 1984); *Liaw SuTeng v. Skaarup Shipping Corp.*, 743 F. 2d 1140 (5th Cir. 1984); and *Pereira v. Utah Transport, Inc.*, 764 F. 2d 686 (9th Cir. 1985).

Both Fifth Circuit cases involved suits for injury or death brought by "blue water" foreign seamen or their representatives against the foreign shipowner-employer, and in both the actions were dismissed by the lower court either on the basis that subject matter jurisdiction was lacking or that forum non conveniens mandated dismissal. In both, the district court was either reversed or the order vacated and the case remanded.

In the Ninth Circuit case, the appeal by the foreign seaman was from the dismissal for *forum non conveniens* in favor "of litigation under Spanish jurisdiction". *Id.* at 687. The Court affirmed, noting the employment contract called for the application of Liberian law, "the law of the flag", and the vessel only visited the United States infrequently. The foreign shipowner argued in

the Court of Appeals that the Court need not reach the choice of law issue since that is not necessary before dismissing for *forum non conveniens.* This was rejected, the court stating [after noting the conflict with the Second Circuit in *Cruz v. Maritime Co. of Phillipines,* 702 F. 2d 47, 48 (2d Cir. 1983)] that "We agree with the Fifth, Tenth, and Eleventh Circuits that a choice of law determination must be made before a district dismisses a case under *forum non conveniens.*" *Id.* at 688.

It is not that the lower court erroneously applied *Lauritzen v. Larsen, supra* and *Hellenic Lines, Ltd. v. Rhoditis, supra,* in determining key issues in this case. The substantial and continuing American contacts of Flota and its vessels had to be considered, as this Court in *Rhoditis* said. 398 U.S. at 310. They were not. But it completely misunderstood the proper course to follow once the shipowner questioned subject matter jurisdiction but failed to ask for conditional dismissal under forum non conveniens.

By granting judgment for the shipowner, the district court completely departed from all previous case law in this field no matter whether a "substantial contacts" test or a "minimum contacts" test is applied, and did so without giving the parties notice that he was treating a challenge to subject matter jurisdiction as a forum non conveniens application.

Petitioner has thus been deprived of even the remedy of an alternative forum for the adjudication of his claim.

CONCLUSION

The Petition for Writ of Certiorari should be granted or in the alternative the judgment vacated and the case remanded.

Respectfully submitted,

HARRY LORE
Attorney for Petitioner

APPENDIX A—MEMORANDUM OPINION, J. GREEN, U.S.D.C. E.D. PA., SEPTEMBER 19, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 78-3451

STEPHEN S. PENNINGTON Adm'r of the Estate of CESAR HUGO CALLE TORRES, Deceased

vs.

FLOTA MERCANTE GRANCOLOMBIANA S.A.

and

GRANCOLOMBIANA (NEW YORK), INC.

and

NORTHERN METAL COMPANY

and

QUIN MARINE SERVICES, INC.

MEMORANDUM

GREEN, J. SEPTEMBER 19, 1983

Stephen S. Pennington, a lawyer engaged in the practice of law in Philadelphia filed this suit in his capacity as administrator of the estate of Cesar Hugo Calle Torres ("Torres"). Mr. Torres

died on February 17, 1978, from injuries received in the course of his employment as a seaman on the M/V REPUBLICA DEL ECUADOR. Plaintiff seeks to recover monetary damages based upon the alleged negligence of defendants and the unseaworthiness of the vessel. Subject matter jurisdiction as to Flota Mercante Grancolombiana, S.A. ("Flota") and Grancolombiana (New York), Inc. ("Grancolombiana" or "Granco") is asserted pursuant to the Jones Act, 46 U.S.C. § 688 and general maritime law of the United States, 28 U.S.C. § 1333. Also, plaintiff alleges jurisdiction under 28 U.S.C. § 1330 in the event Flota is determined to be the instrument of a foreign state and under 28 U.S.C. § 1350 which grants jurisdiction over an alien's action for tort committed in violation of the law of nations or a treaty of the United States.

Flota and Grancolombiana moved to dismiss or for summary judgment for lack of subject matter jurisdiction. As *Lauritzen v. Larsen*, 345 U.S. 571 (1953) makes clear, the allegations in the pleadings would not permit dismissal for failure to state a claim upon which relief could be granted or for lack of subject matter jurisdiction. Nevertheless, the court retains the power to determine whether the claim is well founded in law and fact. After conference with counsel, pursuant to agreement, the issue concerning the applicability of Jones Act and general maritime law was severed from all other issues and tried to the court without a jury. Upon consideration of the stipulated facts set forth in the final pretrial order and the evidence produced at trial, I find that the preponderance of the evidence establishes that the contacts of the parties with the United States are insufficient to subject the defendants to claims based on the Jones Act or general maritime jurisdiction because Ecuador has a substantial interest in the resolution of this dispute while any interest of the United States is insubstantial.

Appendix A

I.

Torres at all relevant times was a citizen of the Republic of Ecuador. He was the boatswain of the M/V REPUBLICA DEL ECUADOR and a member of the Ecuadorian seamen's union which had a collective bargaining agreement with Flota. His wife and child were and are citizens of Ecuador. The vessel is of Ecuadorian registry and the home port of the vessel was Guayaquil, Ecuador. At the time of the accident which caused injury to Torres, the vessel was leaving the pier of Northern Metal on the Delaware River, with a local pilot aboard, bound for South America via the American ports of New York, Baltimore, Maryland and Charleston, South Carolina. Torres' contract of employment was based on the collective bargaining agreement negotiated by the Ecuadorian seamen's union on behalf of the seamen who worked for Flota. After his death, Torres' widow and child received benefits provided by the Social Security Institute of Ecuador. It appears that both Torres and Flota contributed to the Institute Fund.

Stipulated facts, 13 to 27, set forth in the final pretrial order, establish the following:

13. Flota Mercante Grancolombiana, S.A. was established on June 6, 1946 by means of Public Notification No. 2260 before Notary 5° of the Circuit of Bogota, Colombia. It was signed in the Quinta de Bolivar, by the representatives of the Presidents of the Republic of Ecuador, of Venezuela and by the then President of the Republic of Colombia, Dr. Alberto Lleras Camargo.

14. Flota was formed principally by the Federation of Coffee Growers of Colombia.

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15. In 1978, the stock of Flota was owned as follows: 80% Federation of Coffee Growers of Colombia, Republic of Colombia; 20% Banco Nacional de Fomento, Republic of Ecuador.

16. The directors of Flota are either Colombian or Ecuadorian nationals, and directors' meetings are held in Bogota, Colombia.

17. In 1978, all of the vessels owned by Flota flew either in the Colombian or Ecuadorian flag and were registered in either of those two countries. The crews were nationals of the flag of the particular vessel on which they were employed.

18. At all relevant times, the seamen's union which represented Colombian crew members was Union de Marinos Mercantes de Colombia and the union which represented Ecuadorian crew members was Sindicato de Marinos de la Empresa. Plaintiff's decedent belonged to the latter union.

19. The company, upon its inception, also opened an office in the capital city of Ecuador, Quito, but this office was later moved to Guayaquil.

20. Flota started business with eight (8) war surplus vessels which it obtained from the Government of the United States.

21. Over the years, the business of Flota grew enormously, and the Lines that it operated in 1978 and 1979 were worldwide in scope. Attached are copies of the services that it operated in 1978 and 1979, as reflected in the annual reports of the corporation.

22. In Flota's main office in Bogota, the company is divided into several divisions, as shown in the *Commercial Director.*

Appendix A

23. All of Flota's internal records and annual reports are and always have been maintained in the Spanish language, which is the official language of the Republic of Colombia.

24. All crew matters are the sole responsibility of the Captain of each vessel, and local agents have always been and are now expected to render such assistance as necessary to him under the circumstances.

25. Flota has three general agents, one in Rotterdam, one in Japan and one in the United States.

26. Grancolombiana (New York), Inc. (hereinafter "Granco") was formed in 1958 under the corporation laws of the State of New York.

27. At all relevant times all of the issued and outstanding stock of Granco has been owned by Flota.

In addition to the stipulated facts, a substantial amount of evidence was produced at time of hearing bearing on the follows: 1) relationship between Flota and its wholly owned subsidiaries, including Grancolombiana; 2) the operational control of Flota's vessels while in the United States ports; 3) Flota's status as a common carrier under the Shipping Act of 1916; and 4) the nature and extent of the widow's and minor child's rights under Ecuadorian law. Much of the evidence produced is documentary and while the authenticity of the documents is not disputed, there are substantial disputes as to the inferences that should be drawn from the evidence. Plaintiff contends the evidence establishes that although Flota and Grancolombiana are separate corporate entities, in fact, they are one operating entity, and that Flota's base of operation is in fact the offices of Grancolombiana in New

York. Defendants contend that Flota and Grancolombiana are entirely separate legal entities, that Grancolombiana acts only as one of several general agents of Flota, that Flota's base of operation is Bogota, Colombia and that worldwide operation of its vessels are controlled by Flota in Bogota and not by Grancolombiana in New York. The evidence supports the positions urged by defendants.

II.

When the choice of law factors set forth in *Lauritzen v. Larsen, supra,* as supplemented by the base of operations factor recognized in *Hellenic Lines Limited v. Rhoditis,* 398 U.S. 306 (1970) are applied to the facts of this case the law of Ecuador must be applied. Indeed, if only the *Lauritizen* factors were involved plaintiff could not advance any serious argument in favor of applying the Jones Act or general maritime law of the United States to this dispute. Only two of the seven *Lauritizen* factors, the place of the wrongful act and the Law of the forum tend to support a cause of action brought pursuant to the Jones Act or federal maritime law. All other factors weigh heavily in favor of not applying United States law to this controversy. The vessel flew the Ecuadorian flag; the seaman owed allegiance to Ecuador and was domiciled therein; the shipowner's place of incorporation was Colombia; the contract of employment was made pursuant to the law of Ecuador; and the courts of Ecuador are accessible to the seaman's heirs or personal representative.

Nevertheless, defendant argues that when the *Rhoditis* factor of the shipowner's base of operations is added to the *Lauritzen* factors, this court must find that a cause of action exists under the Jones Act and general maritime law of this country. Thus, most of the evidence produced was directed toward the shipowner's

base of operations. A preponderance of the evidence supports a finding that the base of operations of Flota is indeed Colombia. This is so, even though Flota transacts a significant volume of business in the United States either through Flota employees stationed here or its wholly owned subsidiary, Grancolombiana, a New York Corporation, which acts as its general agent. The evidence establishes that Flota and Grancolombiana maintained and continue to maintain separate corporate identities and that Grancolombiana's New York headquarters is not the base of operations of Flota's worldwide shipping enterprise. Nor are any of Flota's shareholders or directors American citizens. Moreover, the evidence convincingly establishes that the decisions concerning Flota's worldwide shipping empire are not made by Grancolombiana but by Flota at its headquarters in Bogota. The evidence permits only one finding, that the base of operations of Flota is not in the United States.

In regard to Grancolombiana, there is no basis to apply the Jones Act or a federal cause of action based upon general maritime jurisdiction. The undisputed evidence is that plaintiff's decedent was an employee of Flota and not of Grancolombiana. As pretrial order stipulation number twenty-four establishes, all crew matters were the sole responsibility of the captain of Flota's vessel.

Plaintiff cites decisions from other districts and circuits but none in fact support the position that he advocates. For example, *Erazo v. Flota Mercante Grancolombiana, S.A.*, 270 F.Supp. 211 (D. Md. 1969) did not recognize a cause of action under the general maritime law of the United States or the Jones Act. The Court applied the law of Colombia to the claim of a Colombian seaman against Flota. In this suit plaintiff has elected not to assert his cause of action under the law of Ecuador. Thus, *Erazo* is inapposite to the facts of this case. *Szumlicz v. Norweigian*

Appendix A

American Line, Inc., 698 F.2d 1192 (11th Cir. 1983) affirmed a finding by the trial judge that the defendant Norwegian American Lines, Inc.'s base of operations was in the United States; however, the determination turned on a factual analysis of the operations of Norwegian American Lines and is not helpful to an analysis of the operations of Flota. More pertinent to the Flota-Grancolombiana analysis is *Rodriguez v. Flota Mercante Grancolombiana*, 703 F.2d 1069 (9th Cir. 1983) in which the Court of Appeals affirmed a finding that Flota was not a Jones Act employer. The Court relied in part, on its conclusion that Flota did not have its base of operations in the United States.

Although plaintiff argues that the substantiality of contacts with the United States justifies applying United States law, in *Chirinos de Alvarez v. Creole Petroleum Corporation*, 613 F.2d 1240 (3d Cir. 1980) Judge Higginbotham made clear that the inquiry does not stop there. He stated:

> [A] court reviewing a claim to Jones Act coverage should determine the substantiality of the links to the United States *and* the links to the foreign sovereignty. This process is undertaken in order to discern in whose "domain" the paramount interest lies. *Lauritzen*, 345 U.S. at 582, 73 S.Ct. 921. Under certain circumstances the Jones Act may be far-reaching. However, when the links to the United States are weak and the interests of another sovereign are substantial, the Jones Act is not applicable.
>
> 613 F.2d at 1246 (emphasis added).

In this case the links to the United States are weak and the links to Ecuador are substantial. The links to Ecuador include the fact that Torres was an Ecuadorian seaman; his employer, Flota, hired him under a collective bargaining agreement entered into with an Ecuadorian union; and, he was injured while employed as a seaman on an Ecuadorian flagship. Also, the heirs of the decedent are citizens of Ecuador, who have already received certain social security-type benefits pursuant to the law of Ecuador from a fund contributed to by both the employee and employer. Furthermore, it appears that a cause of action exists under the law of Ecuador. Adding to these factors the fact that the United States is not the base of operations of Flota, application of the Jones Act and/or federal maritime law to the claims is precluded. *Romero v. International Terminal Operating Co., et al.*, 358 U.S. 354, 383, 79 S.Ct. 468, 486 (1959). It may be true that the financial benefits recoverable under the Jones Act are greater than the benefits under Ecuadorian law, but that fact alone is not a valid reason for applying United States law to this controversy. *Chirinos de Alvarez, supra.* With respect to the argument that general maritime law of America should apply, *Romero, supra,* makes clear that regardless of how the claim of the foreign seaman against the foreign shipowner is labeled, the analysis remains the same and application of American law is inappropriate.

III.

Plaintiff also has asserted jurisdiction pursuant to 28 U.S.C. § 1330 which grants to the District Court original jurisdiction in certain circumstances to hear actions against foreign states. While Flota is at times referred to as the Merchant Marine of Colombia, the evidence is clear that it is not a foreign state or an instrument thereof. Plaintiff also asserts jurisdiction under 28 U.S.C. § 1350 which grants jurisdiction over an alien's action

for tort committed in violation of the law of nations or a treaty of the United States. However, plaintiff has not identified any cause of action arising other than under the Jones Act and general maritime jurisdiction. For the reasons stated above all such claims must fail.

Accordingly, judgment will be entered in favor of defendants, Flota Mercante Grancolombiana, S.A., and Grancolombiana (New York), Inc., and against plaintiff.[1]

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1. This memorandum contains the findings of fact and conclusions of law required by Fed.R.Civ.P. 52(a). Plaintiff submitted requests for findings of fact and to the extent that the requests include both factual matter and argument, requests are denied as stated. To the extent that the requests are limited to factual statements, my findings in reference thereto are included in the above memorandum. Defendant Northern Metal Company submitted to the Court a document labeled "Statement of Position of Northern Metal Company" which supports the position taken by plaintiff. I have read the document and considered the arguments made therein.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 78-3451

STEPHEN S. PENNINGTON, Administrator of the Estate of CESAR HUGO CALLE TORRES, Deceased

VS.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

and

GRANCOLOMBIANA (NEW YORK), INC.

and

NORTHERN METAL COMPANY

and

QUIN MARINE SERVICES, INC.

ORDER

AND NOW, this 19th day of September, 1983, for the reasons stated in the accompanying memorandum, judgment will be entered in favor of defendants Flota Mercante Grancolombiana, S.A. and Grancolombiana (New York), Inc. and against plaintiff Stephen S. Pennington, Administrator of the Estate of Cesar Hugo

Calle Torres. IT IS ORDERED that plaintiff file a final pretrial order in regard to the claims against defendants Northern Metal Company and Quin Marine Services, Inc. on or before October 3, 1983. A final pre-trial conference in regard to this claim is scheduled for October 6, 1983 at 3:30 P.M. in chambers.

BY THE COURT:

/s/

CLIFFORD SCOTT GREEN, J.

APPENDIX B—JUDGMENT, FEBRUARY 4, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 78-3451

STEPHEN S. PENNINGTON, Administrator of the Estate of CESAR HUGO CALLE TORRES, Deceased

vs.

FLOTA MERCANTE GRANCOLOMBIANA S.A.

and

GRANCOLOMBIANA (NEW YORK), INC.

and

NORTHERN METAL COMPANY

and

QUIN MARINE SERVICES, INC.

JUDGMENT

AND NOW, this 4th day of February, 1985, judgment is entered in favor of defendants Flota Mercante Grancolombiana, S.A. and Grancolombiana (New York), Inc. and against plaintiff Stephen S. Pennington, Administrator of the Estate of Cesar Hugo Calle Torres, Deceased.

Appendix B

BY THE COURT:

/s/_____
CLIFFORD SCOTT GREEN

APPENDIX C—JUDGMENT ORDER, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, JULY 1, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1104

PENNINGTON, STEPHEN S., Adm'r of the Estate of TORRES, CESAR HUGO CALLE, Deceased

Appellant

VS.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., LAVINO SHIPPING CO., and XYZ CORPORATION; QUIN MARINE SERVICES, INC.; NORTHERN METAL CO.; EDICIO GRANCOLOMBIANA AND GRANCOLOMBIANA (NEW YORK), INC.

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 78-3451
District Judge: Honorable Clifford Scott Green

Submitted Under Third Circuit Rule 12(6) June 21, 1985
Before: ADAMS, HUNTER and MANSMANN, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

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ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

/s/
JAMES HUNTER, III,
Circuit Judge

Dated: July 1, 1985

APPENDIX D—ORDER DENYING REHEARING JULY 23, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-1104

PENNINGTON, STEPHEN S., Adm'r of the Estate of TORRES, CESAR HUGO CALLE, Dec'd.

Appellant

vs.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., LAVINO SHIPPING CO., and XYZ CORP.; QUIN MARINE SERVICES, INC.; NORTHERN METAL CO.; EDICIO GRANCOLOMBIANA AND GRANCOLOMBIANA (NEW YORK), INC.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit judges*

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and

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no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

s/s HUNTER
Judge

Dated: July 23, 1985